02 763 NOV 18 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

JOANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PAULINE THOMAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General
WILLIAM KANTER
WENDY M. KEATS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Titles II and XVI of the Social Security Act define disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A); 42 U.S.C. 1382c(a)(3)(A). The Act further provides that a claimant "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A); 42 U.S.C. 1382c(a)(3)(B). Under the Act, "work which exists in the national economy" means "work which exists in significant numbers either in the region where such individual lives or in several regions in the country." 42 U.S.C. 423(d)(2)(A); 42 U.S.C. 1382c(a)(3)(B). The question presented is:

Whether the Commissioner of Social Security may determine that a claimant is not "disabled" within the meaning of the Act because the claimant remains physically and mentally able to do her previous work, without considering whether that particular job exists in significant numbers in the national economy.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
A. The statutory and regulatory framework	2
B. The proceedings in this case	9
Reasons for granting the petition	16
A. The Third Circuit's decision conflicts with decisions of four other courts of appeals	17
B. The court of appeals erred in rejecting the Commissioner's longstanding interpretation	20
C. The court of appeals' construction of the Act has significant programmatic implications	28
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Bowen v. *Yuckert*, 482 U.S. 137 (1987)	4, 5, 6, 17, 20, 21, 24, 28
Cleveland v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999)	6
FTC v. *Mandel Bros., Inc.*, 359 U.S. 385 (1959)	21
Garcia v. *Secretary of HHS*, 46 F.3d 552 (6th Cir. 1995)	15, 17, 18, 19, 22
Heckler v. *Campbell*, 461 U.S. 458 (1983)	6, 20, 21, 26
Knight v. *Chater*, 55 F.3d 309 (7th Cir. 1995)	20
Kolman v. *Sullivan*, 925 F.2d 212 (7th Cir. 1991)	20
May v. *Gardner*, 362 F.2d 616 (6th Cir. 1966)	3, 5
Oregon Dep't of Revenue v. *ACF Indus.*, 510 U.S. 332 (1994)	24
Pass v. *Chater*, 65 F.3d 1200 (4th Cir. 1995)	15, 17, 19, 22, 26

Cases—Continued: Page

Quang Van Han v. *Bowen*, 882 F.2d 1453 (9th Cir. 1989) 15, 16-17, 18, 22
Rater v. *Chater*, 73 F.3d 79[illegible] Cir. 1996) 15, 17, 20, 22
Schweiker v. *Gray Panthers*, 453 U.S. 34 (1981) 20
Sims v. *Apfel*, 530 U.S. 103 (2000) 29
Williams v. *Taylor*, 529 U.S. 362 (2000) 24

Statutes and regulations:

Social Security Act, 42 U.S.C. 301 *et seq.* 2
Tit. II, 42 U.S.C. 401 *et seq.* ..... *passim*
42 U.S.C. 405(a) 5
42 U.S.C. 405(b) 9
42 U.S.C. 423(d)(1)(A) 3
42 U.S.C. 423(d)(2)(A) ..... *passim*
Tit. XVI, 42 U.S.C. 1381 *et seq.* ..... *passim*
42 U.S.C. 1382c(a)(3)(A) 5
42 U.S.C. 1382c(a)(3)(B) 5, 26
Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815 3
Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(b), 81 Stat. 868 4
Social Security Amendments of 1972, Pub. L. No. 92-603, Tit. III, § 301, 86 Stat. 1465 5
Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, §§ 101-106, 108 Stat. 1465-1477 2
20 C.F.R.:
Pt. 404 2
Section 404.1502(b) (1961) 3, 27
Section 404.1502(b) (1969) 6
Section 404.1520 6
Section 404.1520(a) 6
Section 404.1520(b) 6
Section 404.1520(c) 6
Section 404.1520(d) 7

Statutes and regulations—Continued: Page

Section 404.1520(e) 7, 17
Section 404.1520(f) 7, 11, 17
Sections 404.1560-404.1568 6
Section 404.1560(b) 7
Section 404.1560(c) 8
Section 404.1561 7
Pt. 416 2
Section 416.920 6
Section 416.920(a) 6
Section 416.920(b) 6
Section 416.920(c) 6
Section 416.920(d) 7
Section 416.920(e) 7, 17
Section 416.920(f) 7, 11, 17
Sections 416.960-416.968 ..... 6, 18
Section 416.960(c) 8
Section 416.961 7

Miscellaneous:

33 Fed. Reg. (1968):
p. 11,749 6
p. 11,751 6
43 Fed. Red. (1978):
p. 55,349 26
p. 55,350 26
p. 55,355 6
p. 55,362 6
H.R. Rep. No. 1189, 84th Cong., 1st Sess. (1955) 3
H.R. Rep. No. 213, 89th Cong., 1st Sess. (1965) 27
H.R. Rep. No. 618, 98th Cong., 2d Sess. (1984) 28
S. Rep. No. 744, 90th Cong., 1st Sess. (1967) 4, 5, 27, 28
Social Security Ruling No. 82-40 (1982) (*available in* 1982 WL 31388) 8, 11, 17
Staff of the Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 2d Sess., *Preliminary Report* (Comm. Print 1960) 26

In the Supreme Court of the United States

No.

JOANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PAULINE THOMAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 294 F.3d 568. The opinion and order of the district court (Pet. App. 24a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2002. On September 10, 2002, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including October 21, 2002. On October 15, 2002, Justice Souter granted a further extension to and including November 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Social Security Act, 42 U.S.C. 301 *et seq.*, and implementing regulations, 20 C.F.R. Pts. 404 and 416, are set forth in the Appendix to the petition, Pet. App. 55a-116a.

STATEMENT

Title II of the Social Security Act (the Act), 42 U.S.C. 401 *et seq.*, provides for the payment of insurance benefits to disabled workers. Title XVI of the Act, 42 U.S.C. 1381 *et seq.*, provides for the payment of Supplemental Security Income (SSI) benefits to disabled individuals if they satisfy certain financial need requirements. This case concerns the showing necessary to establish a "disability" for purposes of those programs. Specifically, it presents the question whether the Commissioner of Social Security may find that a claimant is not disabled because she retains the physical and mental capacity to do a job she previously held, without inquiring into whether that particular job exists in significant numbers in the national economy.[1]

A. The Statutory And Regulatory Framework

1. As enacted in 1935, Title II of the Social Security Act provided old-age benefits for covered workers who retired at age 65, but it made no provision for "a lower retirement age for those who are demonstrably retired"

[1] Responsibility for administering Titles II and XVI of the Social Security Act was previously vested in the Secretary of Health and Human Services. In 1994, the Social Security Administration was made an independent agency, headed by the Commissioner of Social Security. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, §§ 101-106, 108 Stat. 1465-1477. For the sake of consistency, this brief uses the term "Commissioner" to include the predecessor officers responsible for administering the disability programs.

before age 65 "by reason of a permanent and total disability." H.R. Rep. No. 1189, 84th Cong., 1st Sess. 3 (1955). Because Congress concluded that covered workers "forced into retirement" by a disability before age 65 should also receive benefits, *id.* at 4, Congress amended Title II of the Act in 1956 to establish a system of disability insurance benefits. See Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815.

Title II of the Act defines "disability" as the inability to engage in "any substantial gainful activity by reason of an impairment which can be expected to result in death" or last the specified duration. 42 U.S.C. 423(d)(1)(A). The Commissioner's early implementing regulations explained the showing required to establish a disability under that definition. The regulations provided, *inter alia*: "It must be established not only that the individual is incapable of performing his prior, usual or regular work, but also that he does not have the capacity to engage in any other kind of substantial gainful work, taking into account his age, education, experience and skills." 20 C.F.R. 404.1502(b) (1961). The regulations continued: "The physical or mental impairment must be the primary reason for the individual's inability to engage in any substantial gainful activity. Where, for instance, an individual remains unemployed for a reason or reasons not due to his physical or mental impairment but because of the hiring practices of certain employers, technological changes in the industry in which he has worked, or local or cyclical economic conditions, such individual may not be considered under a disability." *Ibid.*; see, *e.g.*, *May* v. *Gardner*, 362 F.2d 616, 618 (6th Cir. 1966) (upholding denial of disability because claimant "failed to establish" that he was "disabled from following his usual occupation as dispatcher in the mines," notwith-

standing that such work was no longer available; "[w]e have * * * consistently held that, once the [Commissioner] finds * * * that the claimant is able to engage in a former trade or occupation, such a determination precludes the necessity of an administrative showing of gainful work which the [claimant] was capable of doing and the availability of any such work").

In 1967, Congress amended the Act by adding 42 U.S.C. 423(d)(2)(A). See Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(b), 81 Stat. 868; *Bowen* v. *Yuckert*, 482 U.S. 137, 147-148 (1987). Section 423(d)(2)(A) provides:

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. 423(d)(2)(A).

Congress added Section 423(d)(2)(A) in response to court decisions that had, in Congress's view, improperly expanded the disability program—and undermined the Commissioner's regulations—by emphasizing the individual's ability to obtain employment in the job market as a practical matter, rather than the individual's functional capacity to work. See S. Rep. No. 744, 90th Cong., 1st Sess. 47-48 (1967). Consistent with the Commissioner's regulations, Congress designed Section

423(d)(2)(A) to "reemphasize the predominant importance of medical factors," rather than job-market considerations, "in the disability determination." *Id.* at 48.

Congress amended the Social Security Act again in 1972 by adding Title XVI to provide SSI benefits to financially needy persons who are aged, blind, or disabled. See Social Security Amendments of 1972, Pub. L. No. 92-603, Tit. III, § 301, 86 Stat. 1465. Unlike Title II, which is an insurance program, the SSI program under Title XVI is a welfare program that is based on financial need. *Yuckert*, 482 U.S. at 140. The SSI program and Title II, however, impose the same requirements for establishing disability. See 42 U.S.C. 1382c(a)(3)(A) and (B).

2. The Social Security Act directs the Commissioner to "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits." 42 U.S.C. 405(a). The Commissioner's regulations have long required a claimant to show that her impairment prevents her from having the capacity to perform her prior work; if the claimant makes that showing, the Commissioner will then determine whether the claimant is capable of performing other work. See pp. 3-4, *supra* (describing 1961 regulations); *May*, 362 F.2d at 618. Following the addition of Section 423(d)(2)(A) in 1967, the Commissioner's revised regulations carried forward the provision from the 1961 regulations that, if "an individual remains unemployed for a reason or reasons not due to his physical or mental impairment but because of * * * technological changes in the industry in which he has worked, * * * the individual may not be considered under a

disability." 33 Fed. Reg. 11749, 11751 (1968) (codified as 20 C.F.R. 404.1502(b) (1969)).

In 1978, the Commissioner comprehensively revised the governing regulations to formalize a five-step sequential evaluation process for adjudicating disability claims. See 43 Fed. Reg. 55,362 (1978). See also *Heckler* v. *Campbell*, 461 U.S. 458, 460-461 (1983); *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 804 (1999); *Yuckert*, 482 U.S. at 140-142. The process is now described at 20 C.F.R. 404.1520 and 416.920. See also 20 C.F.R. 404.1560-404.1568, 416.960-416.968. Under the sequential evaluation process, if a finding of disability or no disability is made at any point in the review, the evaluation does not proceed further. 20 C.F.R. 404.1520(a), 416.920(a). By formalizing the sequential evaluation process, the Commissioner did not change the agency's substantive policies, but rather established consistent procedures for implementing them. See 43 Fed. Reg. at 55,355.

Steps one through three of the sequential inquiry focus on whether the claimant is currently working, whether the impairment is sufficiently severe to be considered potentially disabling, and whether her impairment is (or is equivalent to) a "listed" impairment that can be presumed to be so severe that it precludes all substantial gainful activity.[2] If the claimant is not

[2] At step one, the Commissioner asks whether the claimant is currently gainfully employed; if so, the claimant is not disabled. 20 C.F.R. 404.1520(b), 416.920(b). At step two, the Commissioner asks whether the claimant has a "severe impairment which significantly limits" the claimant's "ability to do basic work activities" such as lifting, standing, and walking, 20 C.F.R. 404.1520(c), 416.920(c); if the impairment is not that severe, the claimant is not disabled. *Ibid.* At step three, the Commissioner determines whether the claimant's impairment is on a list of impairments which are presumed to prevent all substantial gainful activity (or is equal in severity to a listed impairment or combination of listed impairments). 20 C.F.R. 404.1520(d), 416.920(d). If the claimant has such an impairment, she is deemed disabled without further inquiry. *Ibid.*

found either disabled or not disabled at one of the first three steps, the evaluation proceeds to steps four and five, which focus, as required by Section 423(d)(2)(A), on the claimant's ability to do her past work or other work. At step four, the Commissioner determines whether the impairment renders the claimant functionally incapable of performing the kind of work she did in the past. 20 C.F.R. 404.1520(e), 416.920(e). The Commissioner reviews the claimant's "residual functional capacity and the physical and mental demands of the work [the claimant] ha[s] done in the past." *Ibid.* If the claimant "can still do this kind of work," the Commissioner will find that the claimant is "not disabled." *Ibid.*; see 20 C.F.R. 404.1560(b) ("If [the claimant] still ha[s] the residual functional capacity to do [that] past relevant work," the Commissioner "will determine that [the claimant is] not disabled without considering vocational factors of age, education, and work experience"). The analysis thus does not proceed to the final (fifth) step unless the claimant "cannot do any work [she] ha[s] done in the past *because* [the claimant] ha[s] a severe impairment[]." 20 C.F.R. 404.1520(f), 416.920(f) (emphasis added).

If the impairment deprives the claimant of the physical or mental capacity to perform her past work, the Commissioner proceeds to step five and determines whether the impairment prevents the claimant "from doing any other work." 20 C.F.R. 404.1520(f), 416.920(f). See also 20 C.F.R. 404.1561, 416.961 ("[I]f your residual functional capacity is not enough to

enable you to do any of your previous work, we must * * * decide if you can do any other work."). At that step, the Commissioner considers the claimant's "residual functional capacity" and "age, education, and past work experience" to see if the claimant "can do any other work." *Ibid.* "By other work," the Commissioner "mean[s] jobs that exist in significant numbers in the national economy." 20 C.F.R. 404.1560(c), 404.960(c).

The Commissioner has also issued formal Social Security Rulings interpreting the Act and regulations. In a 1982 Ruling addressing the relevance of a claimant's past work in foreign countries, for example, the Commissioner explained that it does not matter whether that particular work exists in the United States economy. Instead, the issue at step four is the claimant's physical and mental capacity to do that past work:

> If a claimant can meet the sitting, standing, walking, lifting, manipulative, intellectual, emotional and other physical and mental requirements of a past job, he or she is still functionally capable of performing that job regardless of the fact that the individual no longer resides in the country where the past work was performed.

Social Security Ruling (SSR) 82-40 (1982) (*available in* 1982 WL 31388, at *2). Thus, "the relevance of past work in a foreign economy * * * is no different from the relevance of past work in the U.S. economy with respect to the physical and mental demands of the particular past job." *Ibid.* "It is only after a claimant proves that he or she is not able to do his or her previous work that the burden shifts to the [Commissioner] to show that there is work available in the U.S. national economy which the claimant can do (the

fifth and last step of the sequential evaluation process)." *Ibid.*

Accordingly, the Ruling stated that it is improper to "elevate[] an element of the fifth step of the sequential evaluation process, availability of work in the national economy, to the fourth step which only deals with the claimant's ability to do his or her past work." SSR 82-42 (1982 WL 31388, at *2). The Ruling concluded:

> The law does not qualify "previous work" but does specify that "other . . . work" must exist in significant numbers in the national economy. The legislative history of the statutory provisions also does not qualify "previous work," but clearly indicates that the provisions were enacted to provide guidelines "to reemphasize the predominant importance of medical factors in the disability determination."

Ibid.

B. The Proceedings In This Case

1. Respondent Pauline Thomas worked as a housekeeper until 1988, when she had a heart attack. Respondent then worked as an elevator operator until she was laid off on August 25, 1995, when her position was eliminated. In June of 1996, at age 53, respondent applied for disability insurance benefits under Title II and SSI benefits under Title XVI, citing heart and back conditions. Pet. App. 25a. Respondent's claim was denied on initial review, Pet. App. 50a-54a, and again on reconsideration, *id.* at 46a-49a.

Respondent then requested a hearing before an Administrative Law Judge (ALJ), see 42 U.S.C. 405(b), who likewise found that respondent is not disabled. Pet. App. 38a-45a. The ALJ noted that, although re-

spondent claimed that she was disabled in part by hypertension and cardiac arrythmia, respondent's cardiologist concluded that she was "doing well without chest pain or shortness of breath," and "was not disabled." *Id.* at 40a. See also *id.* at 29a (cardiologist "found no evidence of organ damage" and "characterized [respondent's] physical examination as 'unremarkable.'"). The ALJ also concluded that, although respondent claimed that she suffered a "stroke" in August 1997, that "appear[ed] to be an exaggeration." *Id.* at 43a. The hospital records showed that respondent had "a transient ischemic attack," *ibid.*, an episode that "usually lasts two to thirty minutes, but * * * then abates without persistent neurological abnormalities," *id.* at 25a n.5. "Upon discharge, [respondent] was allowed to resume normal activities." *Id.* at 43a. Finally, the ALJ did not believe that respondent was disabled by lower back pain or a right ankle fracture she allegedly sustained in July 1996. *Id.* at 42a. Respondent had not provided medical records to show that a fracture had occurred, and "[t]he fact that [respondent] does not take any pain relievers except, perhaps, Ecotrin, tends to contradict her allegation of limiting pain from either the ankle or the back. Further, the ankle fracture should have healed in far less than 12 months." *Id.* at 42a-43a.

The ALJ observed that, "based on the evidence in the record, there is considerable question as to whether there is even a 'severe' impairment" that would allow respondent's case to proceed beyond the second step of the sequential evaluation process. Pet. App. 42a; see pp. 6-7 & note 2, *supra*. Nonetheless, the ALJ ultimately found that respondent was not disabled at step four of the sequential evaluation process, because her claimed impairments would not prevent her from

performing her previous work. Specifically, the ALJ found that respondent "retains the functional capacity for work through at least a light level of exertion," and thus "retains the functional capacity to return to past work as an elevator operator." Pet. App. 43a; see *id.* at 44a-45a ("The claimant has the residual functional capacity to perform work-related activities except for perhaps medium and heavy lifting and extensive bending and stooping. * * * The claimant's past relevant work as an elevator operator did not require the performance of work-related activities precluded by the above limitation.").

The ALJ rejected respondent's contention that it would be improper to find her not disabled at step four—and that the evaluation should proceed to step five for consideration of whether there is "other work" she can do, 20 C.F.R. 404.1520(f), 416.920(f)—because (according to respondent) the job of elevator operator no longer exists in significant numbers in the national economy. See Pet. App. 43a-44a. The ALJ explained that, at step four, the Commissioner's regulations require only a determination of the claimant's physical and mental capacity to meet the demands of a past job; there is no requirement that the particular job exist in significant numbers in the national economy. *Ibid.* The Social Security Administration's Ruling regarding foreign work, the ALJ explained, "emphasizes" that "the proper test in the fourth step of the sequential evaluation process is whether the individual can do her previous work." *Id.* at 43a (citing SSR 82-40). "If the claimant can meet the sitting, standing, walking, lifting, * * * and other physical or other mental requirements of a past job, she is capable of performing that job. It is only after the claimant has proved that she cannot do her previous work that the burden shifts to the

Commissioner and the vocational rules are applied." *Id.* at 43a-44a.

SSA's Appeals Council denied respondent's request for review. Pet. App. 35a-37a.

2. The district court affirmed. Pet. App. 24a-34a. After reviewing respondent's claimed impairments in detail, the district court concluded that there was "no evidence to support [respondent]'s claim that heart problems prevented her from performing her work," *id.* at 29a; "no evidence to support [respondent's] claim that lumbar radiculopothy, a nerve root disorder * * *, prevented her from performing her past work," *id.* at 30a; "no indication that [respondent]'s transient ischemic attack prevents her from performing her past work," *ibid.*; and no "medical evidence to support her claim of musculoskeletal problems," *ibid.* More generally, the court found "no evidence that [respondent] suffers any injuries that would prevent her from performing her job as an elevator operator." *Id.* at 31a.[3]

The district court rejected respondent's argument that her ability to perform her past job is irrelevant, because "she no longer has the option to work as an elevator operator." Pet. App. 31a; see *id.* at 31a-32a.

[3] The district court rejected respondent's argument that the ALJ should not have disregarded a letter from Dr. Magdy Elamir, her treating physician, in which Dr. Elamir stated that respondent is disabled. Pet. App. 32a. Dr. Elamir "did not provide any laboratory or clinical evidence to support the assertion that [respondent] was disabled." *Ibid.* Rather, she sent a "two-sentence letter" asserting that petitioner "was currently under medical treatment and unable to work." *Ibid.* Given the "other physicians [who] found [that respondent] was able to work," and the absence of "hospital records indicating that [respondent] has any functional limitations," the district court held that the ALJ had correctly rejected Dr. Elamir's assertion for lack of "supporting medical findings." *Id.* at 33a.

"Disability," the court concluded, "provides for people who physically are incapable of performing the type of job they did in the past[;] it does not provide for people who lost their job." *Id.* at 28a.

3. a. Sitting en banc, a divided court of appeals reversed. Pet. App. 1a-23a. The court first concluded that the text of the Act precludes the Commissioner from finding that a claimant is not disabled based on her physical and mental capacity to perform her "previous work," unless that previous work (like "any other kind of substantial gainful work") exists in significant numbers in the national economy. *Id.* at 8a. Section 423(d)(2)(A), the court observed, provides that a claimant "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." *Id.* at 7a (emphasis omitted). In the court's view, "[t]he phrase 'any other' * * * makes clear that an individual's 'previous work' was regarded as a type of 'substantial gainful work which exists in the national economy.'" *Id.* at 8a. "This feature of the statutory language," the court concluded, "is unambiguous." *Ibid.*

The court of appeals further held that, "even if the statutory language were ambiguous," the court's interpretation would not change, because, in its view, the contrary construction would lead to "absurd results." Pet. App. 9a. The court perceived "no plausible reason why Congress might have wanted to deny benefits to an otherwise qualified person simply because that person, although unable to perform any job that actually exists in the national economy, could perform a previous job that no longer exists." *Ibid.*

The court of appeals therefore concluded that, if respondent "can show that elevator operator positions really are obsolete," the ALJ must "proceed[] to Step Five of the sequential evaluation to ascertain whether [respondent's] medical impairments prevent her from engaging in any work that actually exists." *Id.* at 11a-12a.

The court rejected the Commissioner's position that allowing claimants to proceed to step five based on job obsolescence "would convert disability benefits into unemployment benefits." Pet. App. 12a. The court likewise was unmoved by the Commissioner's concern about the administrative burden the court's construction would impose. The court acknowledged that the inquiry into the claimant's previous work "was designed to facilitate the determination of whether a claimant has the capacity to work, because it is easier to evaluate a claimant's capacity to return to a former job than to decide whether any jobs exist for a person with the claimant's impairments and vocational background." *Ibid.* And the court accepted the proposition that, "in the vast majority of cases, a claimant who is found to have the capacity to perform her past work also will have the capacity to perform other work." *Id.* at 12a-13a n.5. Nevertheless, the court concluded that, contrary to the regulatory framework, the vocational consideration of whether a claimant's particular past job exists in the national economy should be considered at step four of the sequential evaluation process. *Id.* at 15a-16a. Rejecting the dissent's concern that the ruling "would wreak havoc" with the administrative process, the court posited that cases like the present one should be "rare, and inquiring whether a job such as that of an elevator operator still exists in the national economy is not complex." *Ibid.*

Finally, the court of appeals acknowledged that its decision is inconsistent with *Pass* v. *Chater*, 65 F.3d 1200 (4th Cir. 1995), and *Rater* v. *Chater*, 73 F.3d 796 (8th Cir. 1996), but declared that "neither opinion is persuasive," because neither, in the court's "judgment, devote[d] sufficient attention to the language of the statute or the statutory scheme." Pet. App. 14a. The court of appeals also acknowledged that the Ninth Circuit had upheld the Commissioner's construction in *Quang Van Han* v. *Bowen*, 882 F.2d 1453 (1989), and the Sixth Circuit had reached the same result in *Garcia* v. *Secretary of HHS*, 46 F.3d 552, 558 (1995). Pet. App. 8a n.2. But it disagreed with those decisions as well. *Ibid.*

b. Judge Rendell, joined by Judges Sloviter and Roth, dissented. Pet. App. 17a-23a. In their view, the text of Section 423(d)(2)(A) "requires that disability be based on an initial finding that an individual is 'unable to do his previous work,'" without a determination of whether that work exists in significant numbers in the national economy. Pet. App. 17a. Only "[i]f that condition is met" does the inquiry move on to consider whether a claimant has "the ability to engage in 'any other kind of substantial gainful work which exists in the national economy.'" *Ibid.* The majority had reached the contrary result, the dissenters stated, by "rewriting the statute" and "engraft[ing]" a new requirement—that the past work exist in significant numbers in the national economy—onto the otherwise "perfectly clear first requirement" that the claimant be "unable to do his previous work." *Ibid.* The dissenters explained that, consistent with the statute, "Step Four is not an inquiry into employability or employment opportunity, but, rather, it is an inquiry into *physical capacity*." *Id.* at 18a (citing *Pass*, 65 F.3d at 1204).

Even "if the majority's position is credited," the dissenters contended, "the statute is at best ambiguous," and the agency's interpretation "should be accorded great weight." *Id.* at 21a.

The dissenters also disputed the majority's belief that the Commissioner's construction would lead to absurd results, finding it "quite plausible that Congress decided that if a claimant still retained the physical and mental capacity to do whatever work she previously did, the inquiry should end there with a finding that claimant is not disabled." Pet. App. 19a. Under the statutory framework, the dissenters reasoned, "[p]revious work essentially serves as a proxy for the ability to perform work, not as proof that the claimant can be employed in that particular job." *Ibid.* "[T]he point at Step Four is not that [the claimant] can actually be employed in her past job, but that she is able to do a certain level of work. If Congress and the regulatory body charged with implementing the statutory scheme have determined that [such a claimant] should not be considered 'disabled' if she still has the ability, physically and mentally, to do what she had previously done," the dissent concluded, it is not for the courts to "graft additional requirements on the statutory and regulatory scheme." *Id.* at 23a.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case invalidated the Commissioner's longstanding construction of a central provision of the Social Security Act, holding that a claimant who retains the physical and mental capacity to perform the demands of a previous job can nevertheless be "disabled" under the Act. The court's decision is in direct conflict with the decisions of four other circuits. See *Quang Van Han* v. *Bowen*, 882 F.2d 1453

(9th Cir. 1989); *Garcia* v. *Secretary of HHS*, 46 F.3d 552 (6th Cir. 1995); *Pass* v. *Chater*, 65 F.3d 1200 (4th Cir. 1995); *Rater* v. *Chater*, 73 F.3d 796 (8th Cir. 1996). The decision, moreover, has a significant programmatic impact and misconstrues the Social Security Act, converting the medical and functional definition of disability into an employment-market-driven definition, contrary to Congress's intent.

A. The Third Circuit's Decision Conflicts With Decisions Of Four Other Courts Of Appeals

For decades, the Commissioner has construed the Social Security Act to make the claimant's physical or mental incapacity to perform prior work a pre-condition to a finding of disability, whether or not that particular work is shown to exist in significant numbers in the national economy. See pp. 3, 5-9, *supra*. Thus, at step four of the Commissioner's sequential evaluation process, the Commissioner reviews the claimant's "residual functional capacity and the physical and mental demands of the work [the claimant] has done in the past." 20 C.F.R. 404.1520(e), 416.920(e). If the claimant "can still do this kind of work," the Commissioner will find that the claimant is "not disabled." *Ibid.* Accord 20 C.F.R. 404.1520(f), 416.920(f) (claimants must be unable to perform "any work * * * done in the past *because* [they] have [] severe impairment(s)" (emphasis added)); Social Security Ruling (SSR) 82-40 (1982) (*available in* 1982 WL 31388). See *Bowen* v. *Yuckert*, 482 U.S. 137, 141-142 (1987) ("If the claimant is able to perform his previous work, he is not disabled.").

Invalidating that longstanding construction, the court of appeals held that the Act "unambiguous[ly]" precludes the Commissioner from finding a claimant not disabled based on the claimant's physical and mental

ability to perform the demands of a prior job *unless* that particular job exists in significant numbers in the national economy. Pet. App. 8a. As the court of appeals acknowledged (*id.* at 8a n.2, 14a; see p. 15, *supra*), four other courts of appeals have reached the opposite conclusion.

In *Quang Van Han*, the Ninth Circuit upheld the Commissioner's determination that a Vietnamese refugee was not disabled because he was still capable of performing the work he had performed in Vietnam, whether or not such employment was available in the United States. The court observed:

> The Act sets out two requirements for disability: A claimant must (1) be "unable to do his previous work," and (2) be unable to "engage in any other kind of substantial gainful work which exists in the national economy." * * * Although the Act requires "other" work to exist in the United States, it places no such limitation on "previous work"; it is therefore reasonable to infer that the ability to perform previous work renders a claimant ineligible for benefits whether or not that work exists in the United States.

882 F.2d at 1457.

The Sixth Circuit followed *Quang Van Han* in *Garcia*, 46 F.3d at 558, stating that the statutory language "easily bears the [Commissioner's] interpretation." The legislative history, the court also noted, shows that "Congress intended to distinguish sharply between unemployment compensation and the disability benefits provided by the Act," and that Congress defined disability "as a predominantly medical determination, as opposed to a vocational one." *Garcia*, 46 F.3d at 559. Accordingly, the Commissioner's "refusal to consider the availability of jobs in the national economy at step four * * * is a permissible construction of the Act." *Ibid.*

The Fourth Circuit has likewise upheld the Commissioner's construction. In *Pass*, the claimant asserted that he was disabled even though he had the functional capacity to perform his past job as a gate guard at a construction site. He claimed that his capacity to do that work was not relevant because the job had ended when construction at the site was completed. 65 F.3d at 1203. The court refused to require the Commissioner to consider whether similar gate guard jobs existed in the national economy, or to move to step five of the sequential evaluation process based on the claimant's assertion that they did not. It explained that "a finding of disability under the statute must be based upon a lack of physical or mental capabilities on the part of the claimant, not upon other factors which prevent the claimant from obtaining work." *Id.* at 1204. The court therefore concluded that the regulations concerning past relevant work appropriately "reflect the statute's focus on the functional capacity retained by the claimant," *ibid.*, and that "[t]he question of whether past work continues to exist is therefore not relevant," *id.* at 1207. See *id.* at 1204 ("Past work in the regulatory scheme is a gauge by which to measure the physical and mental capabilities of an individual and the activities that he or she is able to perform, rather than a means by which to assure that the claimant can actually find employment.").

Similarly, in *Rater*, the Eighth Circuit upheld the Commissioner's decision that the claimant was not disabled because he retained the functional capacity to perform his past job as an incinerator operator/watcher, even though the job had been abolished in a reorgan-

ization and was relatively unusual. "The statute," the court held, "does not require a particular job to exist in significant numbers in the national economy in order to constitute past relevant work." 73 F.3d at 799.[4]

B. The Court of Appeals Erred In Rejecting The Commissioner's Longstanding Interpretation

This Court has repeatedly recognized that "Congress has 'conferred on the [Commissioner] exceptionally broad authority to prescribe standards for applying certain sections of the [Social Security] Act." *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983) (quoting *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981)); *Yuckert*, 482 U.S. at 145. "Where, as here, the statute expressly entrusts the [Commissioner] with responsibility for implementing a provision by regulation," the Court's "review is limited to determining whether the regulations promulgated exceeded the [Commissioner's] statutory authority and whether they are arbitrary and capricious." *Campbell*, 461 U.S. at 466; *Yuckert*, 482 U.S. at 145.

---

[4] The Third Circuit relied on dictum in *Kolman* v. *Sullivan*, 925 F.2d 212 (7th Cir. 1991), to support its contrary view. In *Kolman*, the court held that the mentally-impaired claimant's previous job, because it was a temporary "makework training job," should not qualify as past relevant work at step four and that, unless another relevant previous job could be identified, the evaluation had to proceed to step five. *Id.* at 213-214. The court commented that if the temporary training job had been a permanent position that had disappeared, "the fact that [the claimant] could perform it if it did exist does not appeal to us as being either a rational ground for denying benefits or one intended by the regulations." *Id.* at 213. While the majority in this case considered the *Kolman* dictum to be "the most perceptive precedent addressing the question," Pet. App. 13a, the Seventh Circuit itself has declined to expand it. See *Knight* v. *Chater*, 55 F.3d 309, 315-316 (7th Cir. 1995).

1. The Third Circuit's decision in this case improperly rejects the Commissioner's longstanding construction and implementation of the Act. The court of appeals held that the pertinent statutory language is "unambiguous" and precludes the Commissioner from denying a disability claim based on the claimant's capacity to do her former work, unless that work "exists in the national economy," *i.e.*, "exists in significant numbers either in the region where such individual lives or in several regions of the country." Pet. App. 8a. The Third Circuit focused on the words "any other" in the phrase in Section 423(d)(2)(A) that reads: "not only unable to do his previous work but cannot * * * engage in *any other* kind of substantial gainful activity which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added). The Third Circuit concluded that Congress's use of the words "any other" "makes clear that an individual's 'previous work' was regarded as a type of 'substantial gainful work which exists in the national economy.'" Pet. App. 8a.

As a structural matter, however, the clause "which exists in the national economy" in Section 423(d)(2)(A) does not immediately follow the words "previous work"; rather, it immediately follows "any other kind of substantial gainful work." Consistent with standard rules of statutory construction, the phrase "which exists in the national economy" is most naturally understood as modifying only "any other kind of substantial gainful work," the phrase it immediately follows. See, *e.g.*, *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389 & n.4 (1959) (limiting clause is generally to be applied only to the last antecedent, unless the subject matter requires a different construction).

In *Quang Van Han*, the claimant made the same argument that the Third Circuit accepted here, urging

that "the word 'other' preceding 'kind of substantial gainful work,' indicates that 'previous work is a subset of substantial gainful work which exists in the national economy,' and that the previous work must therefore also exist in the national economy." 882 F.2d at 1457. The Ninth Circuit rejected that argument, explaining that it is equally if not more natural to "construe 'previous work' and 'other' work as separate categories, neither a subset of the other. Under such an interpretation the limitations governing other work"—including the requirement that it exist in significant numbers in the national economy—"do not modify previous work; indeed, * * * their absence gives rise to the inference that previous work is not subject to the same restrictions." *Id.* at 1457. Three other circuits reached the same conclusion for similar reasons. *Garcia*, 46 F.3d at 558 (agreeing with Ninth Circuit's analysis); *Rater*, 73 F.3d at 799; *Pass*, 65 F.3d at 1203-1204, 1207.

According to the Third Circuit, however, the phrase "any other" compels the conclusion that "previous work" must be a subset of "work which exists in the national economy." The court stated, "[w]hen a sentence sets out one or more specific items followed by 'any other' and a description, the specific items *must* fall within the description." Pet. App. 8a (emphasis added). As a matter of usage, the court declared, "it makes sense to say: 'I have not seen a tiger or any other large cat' or 'I have not read *Oliver Twist* or any other novel Charles Dickens wrote.' But it would make no sense to say, 'I have not seen a tiger or any other bird' or 'I have not read *Oliver Twist* or any other novel which Leo Tolstoy wrote.'" *Ibid.*

The Third Circuit erred in assuming that, as a matter of either common usage or statutory interpretation, all

items preceding the phrase "or any other" are invariably covered by the entirety of any description (including qualifiers) that follows, and the court's examples do not parallel the grammatical structure Congress used in Section 423(d)(2)(A). It makes perfect grammatical sense—and more closely parallels the structure of Section 423(d)(2)(A)—to say "not only have I not seen a tiger, but I have not seen any other large animal which can climb higher than a tiger"; or "not only have I not read *Oliver Twist*, but I have not read any other Victorian novels which were published after *Oliver Twist*." In the first example, the words "any other" clarify that "tiger" is a category of "large animal," but they obviously do not imply that a tiger can climb higher than a tiger. Likewise, in the second example, the phrase "any other" suggests that *Oliver Twist* is a Victorian novel, but cannot be read to suggest that *Oliver Twist* is a subset of "Victorian novels which were published after *Oliver Twist*." Or, to use another example, a disappointed traveler might complain that the weather was "so severe that we were not only unable to visit the officially recommended sites but we were prevented from visiting any other tourist attractions which our children wanted to see." That sentence does not necessarily imply that the officially recommended sites were ones the children wanted to see; it implies only that the officially recommended sites were "tourist attractions."

Similarly here, the words "any other" in the phrase "not only unable to do his previous work but cannot * * * engage in *any other* kind of *substantial gainful work* which exists in the national economy" may suggest that the "previous work" is a "kind of substantial gainful work." But it is neither necessary nor natural to read the words "any other kind of" as requiring that

BEST AVAILABLE COPY

the previous work *also* be work "which exists in the national economy." Indeed, although more than three decades have lapsed since Section 423(d)(2)(A) was enacted, no court of appeals decision had ever adopted that grammatical construction until the decision in this case. See also *Yuckert*, 482 U.S. at 148 (describing Section 423(d)(2)(A) as restricting "eligibility for disability benefits to claimants whose medically severe impairments prevent them from doing their previous work *and also* prevent them from doing any other substantial gainful work in the national economy") (emphasis added).

2. The Third Circuit's decision, moreover, fails to respect a cardinal principle of statutory construction. If the claimant's "previous work" were merely a form of "substantial gainful work which exists in the national economy" as the Third Circuit believed, Section 423(d)(2)(A)'s requirement that the claimant be unable to do his "previous work" would be largely superfluous. Under the Third Circuit's reading, the Act's meaning and effect would be nearly identical if Section 423(d)(2)(A) had required only that the claimant be unable to perform "any kind of substantial gainful work which exists in the national economy," because that phrase would encompass the claimant's "previous work" if it exists in the national economy. It is, of course, generally inappropriate to construe a statute so as to render part of it surplusage. *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) ("It is * * * a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'"); *Oregon Dep't of Revenue* v. *ACF Indus.*, 510 U.S. 332, 340 (1994).

3. Nor was the court of appeals correct to suggest that the Commissioner's construction yields absurd

results. According to the Third Circuit, "there is no plausible reason why Congress might have wanted to deny benefits" where a claimant, "although unable to perform any job that actually exists in the national economy, could perform a previous job" that has become obsolete and thus "no longer exists." Pet. App. 9a. As an initial matter, the decision below itself yields absurd results because it is not limited to situations in which a claimant's past job has become obsolete; it would apply any time the former position does not exist in "significant numbers" in the national economy, *id.* at 8a, even if the claimant has been offered her former position. Indeed, the court's holding would permit such an individual to *quit* her job and collect disability benefits instead—even though the individual's employer wanted her to return—if that job did not exist "in significant numbers either in the region where such individual lives or several regions in the country." *Ibid.* There is no plausible reason why Congress would have wanted to provide disability benefits to individuals who can work and have been offered a job they can do, merely because the job is unusual or uncommon.

In any event, the Commissioner's construction is reasonable and consistent with Congress's intent. Congress required a showing of physical or mental inability to perform one's prior work not because that prior work is necessarily available, but rather because the ability to perform that job furnishes individualized proof that the individual *can* work. In other words, in prescribing the principles on which the disability program would operate, Congress simply did not accept the Third Circuit's assumption that there are individuals capable of performing one and only one narrow type of work. As the dissenting judges observed below, "the point * * * is not that [a claimant] can actually be employed

in her past job, but that she is able to do a certain *level* of work." Pet. App. 23a (emphasis added); see *Pass*, 65 F.3d at 1204. That is parallel to the way in which the statute uses "other" work at the next step of the analysis—to measure the level of a claimant's physical and mental ability to work, not her actual access to jobs in view of market conditions. Thus, even where "other" work is at issue, the Act declares that it makes no difference whether that work is available near the claimant's home, or whether a vacancy exists, or whether the claimant could get hired. See 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B). It is likewise not unreasonable for Congress or the Commissioner to conclude that, if a claimant remains capable of performing the demands of a job she did in the past, she is not disabled, regardless of whether that particular line of work remains available for whatever reason.[5]

Congress, moreover, wished to make "a clear distinction between this program and one concerned with unemployment." Staff of the Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 2d Sess., *Preliminary Report* 20 (Comm. Print. 1960) (quoted at 43 Fed. Reg. 55,349, 55,350 (1978)). Consistent with that intent, the Commissioner has—from the program's earliest days—required that "[t]he physical or mental

[5] A claimant's previous job is specific and identifiable, and the ability to perform its demands is a direct measure of actual capacity to do work. "Other" work is by definition work the claimant has *not* done, and analysis of that issue is therefore often more removed from empirical proof. Indeed, for that reason, the "other work" inquiry must rely on generalizations (including the "grid" regulations described in *Heckler* v. *Campbell*, 461 U.S. at 461-462, 467-468, presumptions based on age, etc.) that render it a less individualized measure than prior work.

impairment" be the "primary reason for the individual's inability to engage in any substantial gainful activity," and has excluded those individuals who are unemployed "not due to * * * physical or mental impairment but because of * * * technological changes in the industry in which [the claimant] has worked." 20 C.F.R. 404.1502(b) (1961).

4. Congress has repeatedly acknowledged and approved of the Commissioner's construction, even as it amended the Act in other respects. When Congress amended the definition of disability in 1965, for example, it proceeded on the premise that the individual's inability to perform his prior work must result from the claimed impairment. Thus, the House Report stated that, "to be eligible an individual must demonstrate that he is not only unable, *by reason of a physical or mental impairment, to perform the type of work he previously did*, but that he is also unable, taking into account his age, education, and experience, to perform any other type of substantial gainful work, regardless of whether or not such work is available to him in the locality in which he lives." H.R. Rep. No. 213, 89th Cong., 1st Sess. 88 (1965) (emphasis added).

After a series of judicial decisions expanded the scope of the disability program by focusing on the job market rather than the medical effect of the impairment, Congress in 1967 enacted Section 423(d)(2)(A) to reinstate the Commissioner's construction and "re-emphasize the predominant importance of medical factors in the disability determination." S. Rep. No. 744, 90th Cong., 1st Sess. 48 (1967). Contrary to the Third Circuit's decision, Congress clearly understood that, in adding Section 423(d)(2)(A), it was providing that, "*if, despite his impairment or impairments, an individual can still do his previous work, he is not*

under a disability; and that if, considering his age, education, and experience, he has the ability to engage in some other type of substantial gainful work that exists in the national economy even though he can no longer do his previous work, he also is not under a disability regardless of *whether or not such work exists in the general area in which he lives or whether he would be hired to do such work*." S. Rep. No. 744, *supra*, at 48-49 (emphasis added). In 1984, Congress conducted an extensive review of the sequential evaluation process. See, *e.g.*, H.R. Rep. No. 618, 98th Cong., 2d Sess. 6-8 (1984). Although Congress amended the Act to adjust the use of the sequential evaluation process in other respects, it made clear that it did "not wish to eliminate or seriously impair use of that process." *Ibid.*

C. The Court of Appeals' Construction Of The Act Has Significant Programmatic Implications

As this Court has recognized, the Social Security Administration "decides more than 2 million claims for disability benefits each year." *Yuckert*, 482 U.S. at 153. As a result, the need for a sequential evaluation process that "contribute[s] to the uniformity and efficiency of disability determinations * * * is particularly acute." *Ibid.* According to the Social Security Administration, a significant number of the more-than two million claims determined each year—well over two hundred thousand—are decided at step four of the sequential evaluation process based on the claimant's ability to perform prior work. Under the Third Circuit's holding, the agency may no longer employ its longstanding approach to that inquiry, and instead must assist individuals in developing a record regarding whether (and to what extent) the jobs they previously held and

are still able to perform exist in significant numbers in the national economy or in the region where they live. See *Sims* v. *Apfel*, 530 U.S. 103, 110-111 (2000) (because the sequential evaluation of disability is not adversarial, the Commissioner must "investigate the facts and develop the arguments both for and against granting benefits"). Given the volume of claims the Commissioner must handle, that burden is significant. See Pet. App. 18a (Rendell, J., dissenting) (decision below will "wreak havoc with the evidentiary aspects of the administrative process").

Given today's dynamic and technological economy, the burden is likely to increase. Today, job types are becoming obsolete with increasing frequency, just as new types of work increasingly emerge to replace them. As a result, the court of appeals erred in invalidating the Commissioner's regulatory approach based on speculation that cases like this one will be "rare," Pet. App. 16a. The decision below, moreover, calls into question the Commissioner's long-established treatment of claimants whose previous jobs were performed in foreign economies and may not exist in significant numbers in the United States economy. Considering the large number of immigrants in the United States, those cases are not insignificant in number. Under the Third Circuit's decision, those cases too will impose additional administrative burdens and costs on the Title II and Title XVI disability programs.

In sum, the court of appeals' decision fundamentally misconstrues the Act, creates a conflict with the decisions of four other circuits, and invalidates longstanding rules and policies that have, for decades, contributed to the reliability, consistency, and efficiency of Social Security disability decisions. Accordingly, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY A. LAMKEN
Assistant to the Solicitor General
WILLIAM KANTER
WENDY M. KEATS
Attorneys

NOVEMBER 2002